INTERIM GOVERNMENT OF SASKATCHEWAN GUIDE FOR CONSULTATION WITH FIRST NATIONS AND MÉTIS PEOPLE

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The Government of Saskatchewan Guidelines for Consultation with First Nations and Métis People: A Guide for Decision Makers, originally released in June 2006, are now under review. Until such time that a new approach is approved, this document will serve to guide government employees and decision-makers.

BACKGROUND

Treaty and Aboriginal rights are an important component of our legal and social landscape and must be respected. The Treaties benefit both First Nation and non-First Nation communities. It was the Treaties that opened up the west for settlement and the eventual creation of the Province of Saskatchewan.

The Honour of the Crown

The duty of the Government of Saskatchewan to consult with the First Nations and Métis of this province is grounded in a concept called "the honour of the Crown". This means that the **Government must act with honour and integrity in its dealing with First Nations and Métis people**. This, in turn, implies a duty to consult and, if appropriate, accommodate if the actions contemplated by the Government could adversely affect First Nation or Métis rights.

For this reason, **consultation must take place before any legislation, policy, program or other activity that could adversely affect Treaty or Aboriginal rights is developed or put in place.** The consultation process is essential because it may lead to a different approach being taken that would not adversely affect Treaty or Aboriginal rights or would lessen the effect on those rights. As well, failing to consult could result in the courts ordering that the government not proceed or that the action be stopped, struck down or the subject of damages. The risk of government action adversely affecting existing Treaty or Aboriginal rights and being found unconstitutional in the absence of consultation means that First Nations and Métis people are much more than a 'stakeholder' whose views should be sought in the course of a broader public consultation process.

The purpose of consultation is to advance the process of reconciliation. It is not simply a step in a particular process, but an attitude that needs to inform the manner in which the government does its business.

If it is unlikely that a particular government activity would adversely affect Treaty or Aboriginal rights, it should not be assumed that consultation is not necessary. It is important to remember that meaningful consultation is a hallmark of good governance. Departments are expected and encouraged to continue to consult generally with all citizens in the province on matters that may impact those citizens.

CONSULTATION DEFINED

Elements of Consultation

Consultation means different things to different people. For the purposes of this policy, consultation may be summarized as consisting of all of the following elements:

1. **Notification** to the community being consulted, in an appropriate manner and in sufficient detail, when the government is contemplating conduct that could adversely affect Treaty or Aboriginal rights and is proposing to consult on that matter.

2. A reasonable period of **time to allow the community being consulted to prepare its views** and present those views to the government.

3. A **presentation** by, and a discussion with, the community being consulted respecting its views on the issue under consideration.

4. **Full and fair consideration** by the government of the views presented to it.

5. **Reporting back** to the community being consulted of the direction chosen by government, the use made of the information provided and the efforts undertaken to avoid or minimize any adverse affect on Treaty or Aboriginal rights.

This approach should not lead to a process that is mechanical or inflexible. For the process to be successful, **each step must be taken in good faith with the intent of creating *a meaningful process*, a better understanding of the issues and more positive relationships and, ultimately, advancing the process of reconciliation**. Each step in the consultation process will be discussed more fully below.

In summary, consultation means:

1. providing notice;
2. allowing time for a response;
3. listening to the response;
4. considering the response; and
5. reporting back.

GUIDING PRINCIPLES

Principles to be Followed

- Whether government action may adversely affect Treaty or Aboriginal rights is a question that must be asked of all new initiatives, as well as changes contemplated to existing activies.

- **Consultations must be genuine and must be conducted with integrity and in good faith** with the intent of upholding the honour of the Crown.

- First Nation and Métis need to be directly engaged in the consultation process.

- First Nations or Métis who are being consulted are to be given a say in how the consultation process should unfold.

- Consultation should occur as early in the decision-making process as reasonably possible and before final decisions are made.

- **Clear communication must be the cornerstone of consultation**. This applies to all elements of the process and could, for example, require translation services.

- The relevant geographic area to consider is the traditional territory of the community whose rights may be adversely affected.

- The government must maintain overall responsibility for managing the consultation process and is ultimately responsible for ensuring that the honour of the Crown is upheld.

- Consultations must be respectful of the culture and practices of the First Nation or Métis being consulted. For example, requests to have an Elder open with a prayer should be respected.

- **The consultation process should lead to the establishment of respectful and lasting relationships**.

- Detailed records must be kept respecting the process, including all correspondence, records of telephone conversations and e-mails, and minutes and attendees of all meetings.

- Information provided to government in the consultation process is to be used to determine if a potential adverse affect on a Treaty or Aboriginal right can be avoided or mitigated.

CONSULTATION OBJECTIVES

The following are the over-arching objectives of the consultation process:

Objective #1 - Respect for Treaty and Aboriginal Rights

Did the process ensure that the Government of Saskatchewan has:

(a) adequately informed itself on whether its contemplated activity may impact on a treaty or aboriginal right, and if so, how?

(b) established a dialogue with the Aboriginal communities whose rights may be adversely affected by the contemplated activity?

(c) taken into account in its decision-making process the concerns that have been raised?

(d) adequately communicated with the affected communities respecting the Government's efforts to accommodate the concerns raised?

Objective #2 - Reconciliation and Relationship Building with First Nations and Métis

Did the process foster positive and improved relationships with First Nation and Métis Peoples? Does the Government have a better understanding, as a result of the process, of the Treaty and Aboriginal rights at issue? Have the claims, interests and ambitions of all parties been respected? Have options to continue and increase the involvement of First Nations and Métis in the provincial economy been explored?

Objective #3 - Commercial Certainty, Predictability and Timeliness of Decisions

Did the process promote commercial certainty for industry and others who have an interest in using Crown resources? Did the process support and enhance the economic development in an orderly, sustainable manner for the benefit of all residents, including First Nations and Métis, in a timely fashion?

THE CONSULTATION PROCESS

Pre-consultation Assessment

Before getting into the actual consultation process, an assessment will need to be made to determine if consultation is mandatory. This will involve an analysis of the government action that is contemplated so all of the implications are understood. It will also necessitate an understanding of which Treaty rights or Aboriginal rights could be adversely affected by that action. In all but the clearest cases advice should be sought from legal counsel. It is important to remember that while the constitution protects 'existing' Aboriginal and Treaty rights, the nature and extent of those rights have not been exhaustively defined.

The second part of the analysis involves a determination of who is to be consulted. For example, if the government is contemplating action that may adversely affect the Treaty right to hunt for food, would it be necessary to consult with First Nations province wide because of the right for any First Nation individual to hunt anywhere in the province? Recent jurisprudence has indicated that, in these circumstances, **consultation would be required with those first Nations whose traditional territories coincided with the geographic area where the impact would be felt**.

There may be instances where it is clear that consultation is not required. However, the fact that the assessment takes place should serve as an indication that even if an adverse affect on Treaty or Aboriginal rights is not possible, Aboriginal interests may be at play and therefore, as a matter of good governance, consultation should still take place. Finally, in situations of actual emergency (flooding, forest fires, etc.) or where public health and safety are at imminent risk, consultation may not be feasible. In those cases, notification to the First Nations or Métis whose interests may be impacted is appropriate, if circumstances permit.

Providing Notice

The provision of notice to the First Nations or Métis being consulted is the initial step in the consultation process. **The nature of that notice will vary with the nature of the action being contemplated and the Treaty or Aboriginal right at issue**. For example, if the impact of the government action is province wide, there may be a need to meet with political organizations such as the Federation of Saskatchewan Indian Nations to receive its input on how to effectively provide notice and how to design the consultation process.

On the other hand, if the proposed action is restricted to a small geographic area and only a single First Nation, Métis community or Métis local is involved, the notice might consist of a telephone call or an initial meeting followed by a package of written information. Remember though, that relationship building is the key and it is difficult to achieve that without face to face interaction.

Because the issues that give rise to consultation are so varied, it is not possible to set out strict procedures for providing notice that will apply in every case. Nevertheless, **it will be important to ensure that the information provided in the notice is clear, complete and understandable** and provides enough information to allow the community being consulted to adequately formulate its views on the issue and to prepare a response. Also, depending on the nature of the issue, the provision of information might take place over the course of several meetings.

The notice should be provided as early as possible in the process of the development of the government initiative. However, the initiative must be at the stage where the notice will provide adequate information respecting what the government would like to do or achieve. It is particularly important to keep proper records at this stage in case the community in question does not respond. If the matter is later challenged in court, the government will need to establish that it took all reasonable steps to notify the community and that the content of the notice sufficiently described the matter at issue so the community could make an informed choice as to whether or not it wished to respond.

Allowing Time for a Response

For the consultation process to have legitimacy, **adequate preparation time for the community being consulted is necessary**. It is important to remember that resources in First Nation and Métis communities may be limited and that it may take some time for it to become prepared.

If, in the circumstances, it is appropriate to provide technical assistance to the community then such assistance should be made available. However, it is more likely that the group may request funding in order to obtain independent technical information. Decisions with respect to the provision of funding in the consultation process are made using the First Nation and Métis Consultation Participation Fund Guide.

Listening to the Response

Listening is a key aspect of the consultation process. It provides the opportunity to build relationships and understand the culture and concerns of the group being consulted. Whether the process takes place in a formal or informal manner, it is essential that the community being consulted understands that the government is listening and trying to understand the perspective of that community. In most cases, this will result in a dialogue between the community and the government.

The government may need to ask for clarification and further details on concerns that are raised. The process may allow the government to correct misconceptions, and while the communication may be two-way, most of the listening should be done by the government. This step is the opportunity for the community being consulted to have its say. **At the conclusion of this stage it is important that the community had a fair hearing, that the process was meaningful and that its concerns were listened to and understood by the government**.

As with all steps in the consultation process, it is important that accurate and detailed notes be kept of the information put forward by the community being consulted. Such information is necessary if the government action is challenged in court, but, more importantly, the record is needed in the next stage of the consultation process to carefully assess what was said.

Considering the Response in the Decision-making Process

The information collected from the community being consulted will play an important role in the determination of how the government will proceed with its initiative. **The effect of good faith consultation may be to reveal a duty to accommodate**. The government should have a better understanding of the concerns of the community. This understanding must be used in the development of the government's proposed action and should lead to either the avoidance of any adverse impact on a Treaty or Aboriginal right or, if that is not possible, the minimization of any impact.

There may be instances where an adverse impact on a Treaty or Aboriginal right cannot be avoided. A properly carried out consultation may assist in justifying an infringement in the eyes of the courts, but there are other factors that also play a part. It goes without saying that seeking advice from legal counsel is absolutely essential when these issues arise.

Reporting Back

When a decision has been made to proceed in a particular fashion, a report should be provided to the community that was consulted. This report should deal with such issues as why the government is preceding as it is and how the information provided by the community was utilized in the decision-making process. **The reporting back stage should also be used to build on the relationships that have been established in the early part of the consultation process**.

CONCLUSION

The Courts have noted that, at all stages in the consultation process, good faith on both sides is required. **The government's intention at all times must be to address the concerns as they are raised through a process of meaningful consultation**. However, the Courts have also noted that there is no duty to agree. Rather, the commitment is to a meaningful process of consultation.

In all situations, **the controlling question is what is required to maintain the honour of the Crown** and to effect reconciliation between the Crown and the First Nations and Métis with respect to the interests at stake.